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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of MediaOne Group, Inc., Transferor, AT&T Corp., Transferee, Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, for Transfer of Control of Licenses and Authorizations	~~CS Docket No. 99-251~~

AUG 24 1999

BELL ATLANTIC CORPORATION'S PETITION TO DENY THE APPLICATION

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SUMMARY

Bell Atlantic Corporation ("Bell Atlantic") opposes the proposed merger of AT&T Corp. and MediaOne Group, Inc. and respectfully submits this petition to deny their application for authority to transfer control of certain licenses and authorizations. Unlike the earlier AT&T-TCI merger, which involved little more than an outsider's acquisition of TCI's cable empire (and thus presented no competitive problems outside the wireless business), the present merger would combine firms that are already prominent within an industry. It would bring under common control not only two of the largest current owners of cable wires and cable programming (AT&T and MediaOne) but also the two dominant providers of all (not just cable-based) broadband Internet and related services (@Home and Road Runner).

The proposed combination must be rejected for the simple reason that it would violate federal statutory and (as applicants themselves acknowledge) regulatory requirements involving traditional video programming. The merger would also present both horizontal and vertical competition problems. First, it would eliminate serious prospects for much-needed competition (in several markets) by competing owners of nearby cable wires and by competing providers of broadband services. Second, through a classic foreclosure — resulting from the concentrating of ownership of the overwhelmingly dominant technology (cable) for delivery of broadband service, as well as the effective combination of the two leading broadband portals — the merger would impede competition in a host of markets vertically related to broadband services for residential customers. Cable's present dominance cannot be conjectured away by wishful and unfounded speculation hypothesizing a future dissipation through competing technologies that, in meaningful economic terms, are hobbled by regulatory constraints (such as those limiting ILECs) or still off in the distance.

These problems with the proposed merger are dispositive, but it is also important that applicants can hardly be credited in their attempt to justify their merger by general references to improving local-telephone competition. There is no reason to credit applicants' threat not to upgrade facilities without the merger. And in any event the claim of benefits to local residential telephone users is deeply misleading. If current behavior and pronouncements are any guide, and without a concrete enforceable commitment to the contrary, AT&T will offer only tied packages of services that target only the most profitable customers, leaving many ordinary residential telephone users unserved by AT&T as a real-world matter. The touted principal benefit of the merger is thus hollow.

In short, the proposed merger would violate both specific legal requirements and the overarching requirement that the merger serve the "public interest, convenience, and necessity," 47 U.S.C. §§ 310(d), 214(a). Applicants have not met what the Commission has made clear is their burden to justify their merger by showing otherwise. The Commission should therefore deny the application to transfer control of licenses and authorizations.

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BELL ATLANTIC CORPORATION'S PETITION TO DENY THE APPLICATION

The critical facts for evaluating this merger are simple and not subject to dispute. AT&T, which was not a multichannel video programming distributor (MVPD) at all prior to March 1999, is now the largest MVPD in the country, with its interests in former TCI properties, Cablevision's properties, and other cable systems. MediaOne is the third largest MVPD on its own and also has a 25.51-percent interest in the parent of Time Warner Cable, which is the second largest MVPD. The merger thus would dramatically increase the size of the AT&T footprint. The resulting AT&T conglomerate (including companies in which AT&T has an attributable interest of at least 30 percent) would pass approximately 61 percent of U.S. households.

AT&T and MediaOne also have substantial ownership interests in a wide range of video programming that compete for space on cable systems. In addition, the two companies have competing interests in the two competing — essentially the only two competing — current providers of broadband cable services: AT&T has a controlling interest in @Home; and MediaOne, directly and through Time Warner, has a controlling interest in Road Runner. Those two firms today provide an overwhelming share of *all* broadband services to residential consumers.

All of these interests, in cable wires and cable programming and broadband service, would come under common control if the merger application were to be approved. As a result, the merger of AT&T and MediaOne would violate Congress's and the Commission's commands, undermine the development of actual and potential competition among two of the largest and most sophisticated cable companies and their affiliates, and foreclose competition in vertically related markets. Moreover, AT&T and MediaOne have failed to bear their burden of demonstrating that the merger would have the benefits for local telephone service that they hold out as the purported justification for their combination. The Commission should reject the application.

ARGUMENT

I. THE PROPOSED MERGER OF AT&T AND MEDIAONE WOULD VIOLATE STATUTORY AND COMMISSION STRUCTURAL RULES PREVENTING ANTICOMPETITIVE CABLE BEHAVIOR

The proposed merger would increase already high levels of concentration in cable system and program ownership. A year ago, the seven largest multiple system operators (MSOs)[1] served

[1] TCI, Time Warner, MediaOne, Comcast, Cablevision Systems, Cox, and Adelphia.

over 65 percent of all cable-subscribing households,[2] with even this group interlinked by equity investments and joint ventures: Number 3 (MediaOne) owned 25 percent of the parent of Number 2 (Time Warner Cable)[3]; Number 1 (TCI) owned 36 percent of Number 5 (Cablevision)[4]; a joint venture of Numbers 1 (TCI) and 7 (Adelphia) owned and operated several of each company's systems.[5] Recent events have made this concentration even more acute. If AT&T were to complete the MediaOne purchase and also buy the remaining 50-percent interest in Lenfest Communications,[6] AT&T would directly control cable operators whose systems pass almost 29 million or roughly 29 percent of all U.S. homes. And it would actually control a significantly larger share than that: it would own at least 25 percent of Time Warner Entertainment (the parent company of Time Warner Cable); and it already owns over a third of

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[2] NCTA, *Cable Television Developments* 13 (citing Paul Kagan Associates). The rest of the industry is highly fragmented, with close to 1,500 cable system operators each serving "fewer than one percent . . . of subscribers." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, 11 FCC Rcd 15,499, 16,156-57 [¶¶ 1359-1360] (1996) (*"Local Competition Order"*).

[3] Time Warner Entertainment Co. L.P., 1997 Form 10-K405, at 1 (SEC filed Mar. 27, 1998).

[4] In June 1997, Cablevision purchased TCI systems serving 829,000 customers in the New York metropolitan area. In January 1998, TCI agreed to exchange its systems near Hartford, Connecticut, for Cablevision systems in Kalamazoo, Michigan. Subrata N. Chakravarty, *The Convergence Factor*, Forbes, July 27, 1998, at 46. In both cases Cablevision transferred shares of its stock to TCI as part of the transaction. Once both deals closed, TCI became Cablevision's largest shareholder, and TCI's Chairman John Malone and its President Leo Hindery occupied seats on Cablevision's board. Elizabeth Lesly, *Cablevision Loses Its Tunnel Vision*, Bus. Week, Oct. 20, 1997, at 106.

[5] TCI owns a third of the venture and Adelphia the other two-thirds. John M. Higgins, *TCI/Adelphia Combo Complete*, Broadcasting & Cable, Aug. 10, 1998, at 52.

[6] AT&T already owns the other 50 percent through its purchase of TCI. *See* AT&T News Release, *AT&T to Acquire Remaining 50 Percent of Lenfest* (May 4, 1999).

Cablevision, 50 percent of Bresnan Communications, 46 percent of Falcon Communications, 67 percent of Peak Cablevision, 37 percent of U.S. Cable of Coastal Texas, 50 percent of Sioux Falls Cable, 50 percent of Kansas City Cable, 50 percent of Texas Cable Partners, 20 percent of TCA Cable Partners, 33 percent interest in Parnassos Communications, 45 percent of InterMedia Partnership IV and 49 percent of InterMedia Partnership VI, as well as interests in Lenfest subsidaries Susequehanna Cable, Raystay Communications, and Garden State Cable.

The merger would also increase the already high level of concentration in ownership of cable programming. As described more fully below, applicants cannot deny this increased concentration through efforts to hide their connection with Liberty, going so far as to claim that they lack an "economic" interest in Liberty.[7] This effort defies economic reality. The Commission has already found that "Liberty Media [is] a wholly owned subsidiary of AT&T, and transactions between the merged company and Liberty Media programmers will therefore fall within the scope of the Commission's program access rules."[8] Although Liberty has a separate tracking stock, issued by AT&T, it holds no separate annual meeting, publishes no

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[7] Applications and Public Interest Statement, *Applications for Consent to the Transfer of Control of Licenses*, CS Docket No. 99-251, at 10 (FCC filed July 7 and July 15, 1999) ("AT&T/MediaOne Application").

[8] Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3179 [¶ 35] (1999) (footnote omitted) ("*AT&T/TCI Order*"). AT&T-TCI even "acknowledge[d] that the merged firm will be subject to the Commission's program access rules." *Id.* at 3179 n.117 [¶ 35].

annual reports, and has assets (represented by the tracking stock) that are completely owned by AT&T.[9] The Department of Justice has also found that AT&T controls Liberty.[10]

As a result of the combination of system and programmer interests, the present merger would violate statutes and regulations and create the very competitive problems that those legal requirements target. In fact, the prohibitions on anticompetitive behavior embodied in the 1992 Cable Act and the Commission's implementing regulations have been reinforced in a series of antitrust consent decrees.[11] The decrees bar cable companies from entering or renewing exclusive distribution arrangements, from entering into other arrangements that limit a programmer's rights to deal with competing distributors, or from engaging in any kind of retaliatory conduct against companies providing programming to cable competitors.[12] The Justice Department also brought an action against the TCI/Liberty merger and entered into a consent decree that prohibited discrimination in favor of affiliated video programmers and barred TCI/Liberty from refusing to sell, or selling on discriminatory terms, programming to competing

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[9] Liberty Media Corp., *Liberty at a Glance - FAQ* (visited Aug. 19, 1999) <http://www.libertymedia.com/liberty_ glance/03-index.html>.

[10] *See* Competitive Impact Statement at 4, *United States v. AT&T Corp.*, No. 1:98CV03170 (D.D.C. filed Dec. 30, 1998) ("Liberty will be a wholly-owned subsidiary of AT&T Corp.").

[11] *United States v. Primestar Partners, L.P.*, No. 93 CIV 3913, 1994 U.S. Dist. LEXIS 14978 (S.D.N.Y. Apr. 4, 1994) ("*Primestar Federal Decree*"); *New York v. Primestar Partners, L.P.*, No. 93 CIV 3868, 1993 U.S. Dist. LEXIS 21122 (S.D.N.Y. Sept. 10, 1993) ("*Primestar New York Decree*"). The defendants in these cases included Comcast Corp., Continental Cablevision, Inc., Cox Enterprises, Inc., Newhouse Broadcasting Corp., Inc., Tele-Communications, Inc., Time Warner, Inc., Viacom, Inc., and GE American Communications, Inc. (a subsidiary of General Electric).

[12] *Primestar Federal Decree*, 1994 U.S. Dist. LEXIS 14978, at *3-*8; *Primestar New York Decree*, 1993 U.S. Dist. LEXIS 2122, at *26-*27, *31-*32.

cable operators.[13] The specific statutory and regulatory proscriptions at issue are thus structural protections against well-recognized competitive problems.

A. Subscriber-Limitation Rules

The merger would violate the "subscriber limitation" rules imposed by the Commission and by Congress. Section 613(f) of the Communications Act (section 11(c) of the 1992 Cable Act)[14] directed the FCC to establish an upper limit on the number of cable subscribers that may be reached by cable systems controlled by a single entity.[15] In 1993, the Commission established a 30-percent limit on the number of homes passed nationwide that any one entity could reach through cable systems in which such entity has an attributable interest.[16]

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[13] *See* Proposed Final Judgment and Competitive Impact Statement, *United States v. Tele-Communications, Inc.*, No. 94-0948, 59 Fed. Reg. 24,723, 24,727 (May 12, 1994).

[14] 47 U.S.C. § 533(f)(1)(A).

[15] The Commission has also indicated that joint ventures may be considered as a single entity for purposes of determining whether the 30-percent subscriber rule has been reached. *See* Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, 13 FCC Rcd 14,462, 14,480 n.104 [¶ 43] (1998) ("*Reconsideration Order*").

[16] *See* Second Report and Order, *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 8565, 8567 [¶ 3] (1993) ("*Cable Order*"); *see also* 47 C.F.R. § 76.503(a). An "attributable interest" is an ownership interest (including through partnerships and voting stock) of 5 percent or more. Ownership of cable systems that reach up to 35 percent of all homes passed nationwide is permitted "provided the additional cable systems, beyond 30 percent of homes passed nationwide, . . . are minority-controlled." 47 C.F.R. § 76.503(b); *Cable Order*, 8 FCC Rcd at 8567. "Minority-controlled" is defined as "more than 50 percent owned by one or more members of a minority group." 47 C.F.R. § 76.503(d).

Applicants admit that the attributable interests in cable systems after the proposed merger would surpass 61 percent, more than twice the Commission's designated limit.[17] Although the Commission voluntarily stayed its subscriber-limitation rules pending the outcome of a constitutional challenge by Time Warner,[18] it has recently reiterated its intention to maintain the 30-percent horizontal ownership limit should the rules be upheld by the Court of Appeals for the D.C. Circuit. The "parties will be required to come into compliance with the horizontal ownership rules within 60 days of the appellate court's issue of a mandate upholding [the section and the rules,] unless the Commission determines as part of this ongoing proceeding to lift the stay at an earlier date."[19] In short, it is undisputed that the proposed merger would be unlawful under the Commission's rules.

Even if the Commission were to tinker with the rules, moreover, it could not do so in a way that would excuse the present merger without violating the basic statutory command that the Commission establish "reasonable limits" (§ 613(f)) on the number of subscribers that affiliated cable systems may amass. What constitutes a "reasonable limit" must be determined in light of

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[17] AT&T/MediaOne Application at 67 (acknowledging that if Commission's rules are upheld in their current form, AT&T would have to seek a waiver).

[18] *See Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C. 1993), *appeal filed sub nom. Time Warner Entertainment Co., L.P. v. FCC*, Nos. 94-1035, 95-1337, 96-5272 (D.C. Cir. Nov. 12, 1993, Jan. 4, 1994, July 3, 1995) (oral argument in this consolidated appeal is now scheduled for December 3, 1999).

[19] *See Reconsideration Order*, 13 FCC Rcd at 14,492 [¶ 77]. The Commission also held that the 30-percent horizontal rule would apply to cable companies that act in concert or through a joint venture, but it did not "have sufficient information regarding the many joint ventures and other transactions, recently announced by cable MSOs such as TCI, Cablevision, Adelphia, Falcon, Time-Warner, etc., to determine conclusively whether these transactions will result in attributable ownership interests that would place some MSOs above the 30% threshold." *Id.* at 14,480 n.104 [¶ 43].

the statutory purposes. Under any view, 60 percent of the Nation exceeds any reasonable limit on the number of subscribers that may be served by cable systems — who still overwhelmingly dominate the delivery of video programming — that are allied through common, non-trivial ownership interests of a single firm.

Congress made clear its fundamental purpose to prevent the accumulation by cable systems in affiliated hands of "power to determine what programming services can 'make it' on cable."[20] The Commission recently explained, moreover, that the subscriber-limit rules have "everything to do with the fact that the [industry-dominant cable operators'] size would permit them to control public access to video programming, in contravention of the long-established First Amendment goal 'of promoting a diversity of ideas and speech throughout the country.'"[21] According to the Commission, the "'concentration of the media in the hands of a few' is particularly troubling where the medium at issue permits the owner to 'control the dissemination of information.'"[22]

The Commission must apply its rules consistently. If the subscriber-limitation rules are judicially upheld, or indeed if any rules that fairly implement the statutory command are held

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[20] S. Rep. No. 102-92, at 33 (1991) ("*Senate Report*").

[21] Brief for the FCC and the United States at 20-21(filed Aug. 13, 1999), *Time Warner Entertainment Co., L.P. v. FCC*, No. 94-1035 (and consolidated cases) (D.C. Cir. filed Nov. 12, 1993) ("FCC Brief") (quoting *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1495 (1999)).

[22] *Id.* at 21-22 (quoting *Senate Report*, *supra* note 20, at 32). Although the Commission has reiterated its commitment to the 5-percent ownership benchmark, *see* FCC Brief, *supra* note 21, at 49-50, AT&T's interest in every cable company attributed to it under the FCC's rules is *at least 20 percent*. Indeed, even if the Commission were to raise the benchmark from 5 percent to 30 percent, AT&T's cable companies would still pass approximately 61 million homes.

constitutional, then the current application cannot be granted. Nor can a "waiver" be granted: any waiver for the extraordinary proposed 60-percent footprint would drain the basic statutory command of its core content.[23]

B. Channel-Occupancy Rules

In the 1992 Cable Act, Congress also addressed its concern with cable operators' excessive influence over programmers by directing the Commission to prescribe rules establishing "reasonable limits" on the number of channels in a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest.[24] For cable systems with channel capacity of up to 75 channels, the Commission has adopted a 40-percent limit.[25] The applicants' merger almost certainly would violate this rule in numerous markets throughout the Nation; moreover, it will violate the basic statutory requirement itself.

AT&T's affiliates already hold extensive interests in conventional video channels, ranging from HBO and the Discovery Channel to Fit TV.[26] The additional programming

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[23] *See MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994) ("modification" limited to small deviations from basic command); *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969) ("The very essence of waiver is the assumed validity of the general rule.").

[24] The Commission stated that the subscriber limits and channel-occupancy limits "are intended to promote diversity and to encourage competitive dealings between cable programming services and cable operators and between cable programming services and competing video distributors. Channel occupancy limits, in particular, restrict the ability and the incentive for cable operators to favor programming services in which they have an attributable interest." *Cable Order*, 8 FCC Rcd at 8607-08 [¶ 103].

[25] 47 C.F.R. § 76.504(a); *Cable Order*, 8 FCC Rcd at 8567 [¶ 4]. Up to 45 percent of the system's channel capacity is allowed if the additional channels are minority-controlled. The attribution rules are the same as for the horizontal ownership rules.

[26] The Madison Square Garden Network is owned by TCI and Cablevision, while E! Entertainment is owned by Comcast, MediaOne and TCI. Court TV is owned by TCI and Time

interests of MediaOne, both directly and through its 25% interest in Time Warner, would strengthen AT&T's hold even further. All together, AT&T would own interests in at least 76 programming channels.[27]

The violation of the Commission's rules that would be caused by the merger would be exacerbated by applicants' interests in @Home and Road Runner: the additional provision of these Internet services would take the cable operators over the 40-percent limit in many of their largest markets, because the affiliated @Home and Road Runner services occupy at least two channels. The term "channel" covers these services under the plain terms of the definition: "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel."[28] Streaming video and similar services are clearly comparable to television and constitute "video programming," at least when provided through a broadband services like @Home/Road Runner.[29] A television channel uses roughly 6 MHz, and delivery of Internet services over a hybrid-fiber-coaxial cable network requires at least two

Warner. Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24,284, 24,429, app. D, tbls. D-1, D-3 (1998) ("*Fifth Video Markets Report*"); 1997 Annual Reports of TCI and Cablevision Systems; Sallie Hofmeister, *Interacting With The Future: Cable Mogul John Malone Has Been Busy Repositioning Liberty Media —and Himself—To Play a Major Role in the Next Internet*, L.A. Times, Apr. 7, 1999, at C1.

[27] *Fifth Video Markets Report*, 13 FCC Rcd at 24,429, app. D, tbls. D-1, D-3 (number includes the programming interests of TCI, MediaOne, and Time Warner). As of now, AT&T controls 63 channels.

[28] 47 U.S.C. § 522(4).

[29] *See infra* notes 46-51 and accompanying text.

channels, one for downstream traffic and another for upstream signals.[30] According to Time Warner, Road Runner uses roughly twice the spectrum of an ordinary channel on Time Warner's upgraded cable systems.[31] AT&T's @Home/Road Runner service must, accordingly, be viewed as occupying an additional two affiliated programming channels.[32]

In fact, this way of counting AT&T's occupancy of the @Home/Road Runner spectrum understates the impairment of the statutory policy. The efficiencies of packet switching mean that the effective bandwidth is much greater for Internet access and far more valuable than the channels assigned to conventional video programming. This point is clear on the basis of price alone. The average cable subscriber pays approximately $30 per month for 54 channels of cable programming.[33] Cable-modem service averages about $40 per month,[34] and @Home charges

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[30] Cable Datacom News, *Overview of Cable Modem Technology and Services* (visited Aug. 18, 1999) <http://www.cabledatacomnews.com/cmic/cmic1.html> (to deliver data services over a cable network, one television channel (in the 50-750 MHz range) is typically allocated for downstream traffic and another channel (in the 5-42 MHZ band) is used to carry upstream signals).

[31] *See* Time Warner, *Time Warner Cable Fact Book* (visited Aug. 23, 1999) <http://www.pathfinder.com/corp/fbook/fbcable.html>.

[32] In several of its largest markets, AT&T/TCI's channel occupancy level comes close to exceeding the maximum even before attributing two channels to @Home. *See* <http://www.tvguide.com>.

[33] Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, MM Docket No. 92-266, FCC No. 99-91, ¶ 4 (rel. May 7, 1999) (average monthly rate for noncompetitive systems: $30.53).

[34] Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, 2444, chart 3 [¶ 87] (1999) ("*Advanced Services Report*"); *see also* Road Runner, *Explore Road Runner — Pricing*, (visited Aug. 18, 1999) <http://www.rr.com/rdrun/explore/pricing_fs.html> ($39.95 per month); Knology, *Knology Internet Rates — Residential* (visited

between $40 and $45 per month.[35] The channels used for broadband access are worth at least as much as the rest of the channels combined: it is like a port with more piers than all other smaller ports combined. More and more, producers of video programming will compete for access to viewers through the broadband-access channel, where they can reach viewers in smaller segments than through year-long 24-hour-a-day occupancy of a fixed channel.

AT&T's exclusive occupancy of this most valuable piece of the cable-wire spectrum, through its @Home/Road Runner services, strikes at the heart of the statutory policy. The Commission has recently explained that the channel-occupancy provisions (of its regulations and of the statute) are designed "to address the fact that 'vertical integration gives cable operators the incentive and ability to favor their affiliated programming services.'"[36] The Commission has insisted that the channel-occupancy requirements seek "to ensure that a cable operator [does] not unfairly exclude non-cable-affiliated programmers from its system."[37] AT&T's control of the broadband-access channel (as the @Home/Road Runner services sell preferential access to their portals) gives it an ever expanding ability to exercise the very kind of power over video content that Congress insisted on structural means to prevent. To permit this control is simply inconsistent with the statutory command to establish "reasonable limits" on a cable system's

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Aug. 18, 1999) <http://www.knology.com> (between $30 and $50 a month depending on how many other services customer take).

[35] @Home, *Price* (visited Aug. 19, 1999) <http://www.home.com/pricing.html> (pricing varies by market and may be lower if customers subscribe to the cable TV service).

[36] FCC Brief, *supra* note 21, at 27 (quoting *Senate Report*, *supra* note 20, at 25).

[37] *Id.* at 41.

occupancy (through affiliates) of excessive channel capacity. Only an open-access requirement would alleviate that problem.

Furthermore, the Commission has taken steps to ensure that, as alternative technologies for delivering video programming are introduced, there remains adequate capacity for non-affiliated programming vendors. For example, when establishing regulations for open video systems, the Commission provided that "[i]f carriage demand by video programming providers exceeds the activated channel capacity of the open video system, the operator of the open video system and its affiliated video programming providers may not select the video programming services for carriage on more than one-third of the activated channel capacity on such system."[38] Significantly, the Commission retained this one-third limit even for such technologies as "switched-digital video," which purported to provide virtually unlimited programming capacity. Because "even the most serviceable of such technologies can be subject to severe interference or blocking during peak periods and other limitations . . . [the Commission] determine[d] that it is premature to make any broad findings with respect to switched digital video . . . [and that it would] therefore reexamine the impact of switched digital technology on the measurement of open video system capacity on a case-by-case basis."[39] If AT&T's systems have unlimited capacity, it has the burden of proving so; it has failed up to now even to acknowledge the issue.

At a minimum, therefore, the Commission must insist that the applicants provide a market-by-market disclosure of the programs currently carried on their systems. Moreover, if

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[38] 47 C.F.R. § 76.1503(c); *see also* 47 U.S.C. § 653(b)(1)(B).

[39] Second Report And Order, *Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, 11 FCC Rcd 18,223, 18,263 [¶ 61](1996).

there is no channel capacity problem, they should demonstrate how. Because AT&T and MediaOne bear the burden of proving that their merger is procompetitive,[40] their failure to provide this information is itself sufficient to defeat the application in its current form.

C. Program-Carriage Rules

Like the channel-occupancy rules, the program-carriage rules[41] are aimed at preventing cable operators that own or are affiliated with content providers from discriminatorily impeding nonaffiliated content providers from gaining access to subscribers through their distribution networks. The Commission's program-carriage rules were themselves instituted pursuant to specific statutory mandate.[42] The regulations prohibit a cable operator from (1) conditioning carriage of a programming service upon receiving a financial interest in any of those services; (2) coercing a programming vendor to provide exclusivity as a condition of carriage and retaliating against a vendor for not providing exclusivity; and (3) discriminating against a programming vendor on the basis of affiliation or nonaffiliation. A vendor is "unaffiliated" if the cable operator lacks an "attributable interest" in the vendor.[43] The statute required these prohibitions.

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[40] *AT&T/TCI Order*, 14 FCC Rcd at 3169 [¶ 15]; Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18,025, 18,031 n.33 [¶ 10] (1998) ("*MCI/WorldCom Order*").

[41] 47 C.F.R. § 76.1301.

[42] *See* 47 U.S.C. § 536.

[43] "Video programming vendor" means "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(b); *see also* 47 C.F.R. § 76.1300(a); Second Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2650 [¶ 19] (1993).

providing, among other things, that the Commission must "prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[44]

Applicants are already violating these proscriptions. Such a violation of important legal requirements should, in this circumstance, be enough to justify denying the application to transfer licenses. Moreover, there can be no doubt that the combination of the two overwhelmingly dominant broadband portals — placing in essentially one hand the power over access — is itself conduct that increases the very discriminatory disadvantaging of unaffiliated content providers that Congress condemned.

The most sweeping violation is at the ISP level. To the extent that Internet service providers allow access to traditional video programming, such as broadcasts of CNN, they are certainly providing programming that is comparable to that which is provided by a television

[44] 47 U.S.C. § 536(a)(3).

broadcast station.[45] Applicants' refusal to deal with ISPs other than their own affiliated @Home/Road Runner constitutes naked discrimination against unaffiliated video programmers.

In addition, AT&T has imposed a serious and unilateral restriction on downstream programmers. Perceiving a threat to traditional cable programming, @Home's partners and affiliates have responded by deliberately crippling the "streaming video" software that makes broadcast-quality video possible over the Internet. They have directed @Home to restrict individual streaming sessions to 10 minutes.[46] Time Warner has imposed an identical restriction on companies seeking to provide content over its Road Runner service.[47] Questioned about this strategy by Chairman Kennard at a recent FCC hearing,[48] TCI's president baldly asserted his right to "determine[] how streaming video worked in our world."[49] "The limitation" he explained

[45] *See* 47 U.S.C. § 522(20). Indeed, the picture quality of video programming over the Internet using broadband cable facilities is nearly the same as when it is provided as traditional video programming over cable. The recent convergence of technology has meant that differences in the video experiences between broadcast television and Internet video over cable are disappearing. And the content of programming, whether provided over the Internet using a broadband connection or as traditional video programming over cable, is certainly comparable. Recent commercial developments show that Internet video is comparable to — and competing with — broadcast video. *See generally* Robin Lloyd, *Apple Tackles Net TV*, CNN.com (July 22, 1999) <http://cnn.com/TECH/computing/9907/22/quicktime.tv/>; Christopher Jones, *Net Video Coming of Age?*, WiredNews (visited Mar. 23, 1999) <http://www.wired.com/news/news/technology/story/18645.html>; Marc Graser, *Trimark Webbing Up*, Variety.com (Aug. 4, 1999) <http://www.variety.com/search/article.asp?article ID= 1117750019>. *Studios Announce More Streaming Video Deals*, Comm. Daily (July 26, 1999) ("Studios increasingly are using Internet as [a] medium to sell and promote video."); John Geirland, *Short Attention Span Theater*, Salon.com (July 21, 1999) <http://www.salon.com/tech/feature/1999/07/21/short_films/index. html>.

[46] Fred Dawson, *RealNetworks, @Home Team Up on Streaming*, Multichannel News, Jan. 18, 1999, at 2.

[47] *Do They Have Anything in Common?*, The Economist, Feb. 13, 1999, at 61.

[48] Transcript of FCC En Banc Hearing Regarding Telecom Mergers at 27 (Oct. 22, 1998).

[49] *Id.* at 31.

"is one that I imposed on AtHome so that I . . . determined my future in the area of streaming video."[50] The National Association of Broadcasters has recognized the implications clearly: "[I]n providing Internet service, TCI reserves the right to limit access to potentially competitive programming providers."[51] Such limitations on access are precisely the sort that the program-carriage rules were designed to prevent.

At a minimum, before it can rule on the application, the Commission must inquire of AT&T and MediaOne about their plans for refusing to carry unaffiliated video programmers on their broadband networks. The applicants must disclose the terms of their current contracts limiting such carriage and explain, if they can, how such restrictions are consistent with the Commission's program-carriage rules. In light of the applicants' burden of proof, their failure up to now to explain any of this requires rejection of the application in its present form.

D. The Unavailability of the Program-Access Rules

The 1992 Cable Act prohibits a cable operator with an attributable interest in a "satellite cable programming vendor" from discriminating against unaffiliated MVPDs that seek access to the vendor's programming.[52] "Satellite cable programming" is defined as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."[53] The Commission promulgated

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[50] *Id.*

[51] Ted Hearn, *Rivals Demand Access to AT&T-TCI Networks*, Multichannel News, Nov. 2, 1998, at 2.

[52] *See* 47 U.S.C. § 548(b).

[53] 47 U.S.C. § 605(d)(1).

program-access rules[54] to ensure that all MVPDs are able to obtain access from satellite video programming vendors on non-discriminatory terms. In principle, program access rules protect competing distributors from anticompetitive conduct by owners of video programming.

AT&T already controls a very high share of major video channels. Even among the top 50 channels, according to the *Fifth Video Markets Report*, AT&T already has an attributable interest in 25, or half.[55] The MediaOne merger would add attributable interests in three more channels.[56] Moreover, out of the top 50 channels, there is only one MSO-held channel in which AT&T would not have an attributable interest after the merger: Knowledge TV, which is 97 percent held by Jones. AT&T currently has attributable interests in 25 of 29 (86 percent) MSO-associated channels and would have interests in 28 of 29 (97 percent) after the merger.[57] And this merger is occurring at a time when advances in technology are now poised effectively to repeal the program-access rules altogether. Before long, all video programming, including all the content distributed over conventional cable TV channels, will be stored in digital format. Digital formats are already easier to store, edit, and process; they will soon be easier and cheaper to create at the outset. A digital format is of course essential if content is to be distributed over the

[54] 47 C.F.R. §§ 76.1000-.1004.

[55] This includes interests held via Liberty's 9-percent stake in Time Warner and TCI's 36-percent interest in Cablevision). *See Fifth Video Markets Report*, 13 FCC Rcd at 24,450, app. D, tbl. D-6.

[56] AT&T's interest in the Golf Channel, The Food Network, and Comedy Central would be gained through MediaOne's directly held programming, as well as an additional 25.5-percent stake in Time Warner. This would give AT&T attributable interests in 28 of the top 50 channels (56 percent). *See id.*

[57] *See id.*

Internet. Most conventional cable TV channels are currently distributed via satellite. But once the content is digital, it can readily be distributed to cable head-ends via the Internet.

As soon as that happens, nothing under current law will prevent AT&T from discriminating against unaffiliated distributors with impunity. The program access rules will no longer apply.[58] Indeed, the Commission has already "decline[d] to apply the program access rules or equivalent restrictions to terrestrially delivered programming distributed by the merged [AT&T-TCI] company."[59] Broadband portal services such as @Home and Road Runner have already entered into exclusive agreements with media companies to develop a number of broadband services and to provide content of their own.[60] AT&T/MediaOne can duck out from

[58] This is no hypothetical musing: earlier this year, the Commission dismissed a program-access complaint in which Echostar Communications Corp., a direct broadcast satellite provider, alleged that Comcast had refused to permit Echostar to carry SportsNet, a sports channel distributed through terrestrial microwave and fiber technology. In dismissing Echostar's complaint, the Commission concluded that the program-access provisions

> apply to satellite cable programming, not programming that was "previously" satellite-delivered, or the "equivalent" of satellite cable programming, or programming that would qualify as satellite cable programming, but for its terrestrial delivery. . . . [T]he version of the program access provision that the Senate adopted would have extended to terrestrially-delivered programming services but the House bill, that was eventually adopted, did not. This indicates a specific intention to limit the scope of the provision to satellite services.

Memorandum Opinion and Order, *Echostar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089, 2099 [¶ 21] (1999).

[59] *AT&T/TCI Order*, 14 FCC Rcd at 3180 [¶ 37].

[60] Even before the AT&T/TCI merger, AT&T had entered into exclusive agreements with media companies to develop a number of broadband services. These companies include Bloomberg, Fox News, the NBA, and MTV. *See, e.g., @Home Network and MTV Team to Create the Ultimate Broadband Entertainment Experience*, PR Newswire, Nov. 4, 1998; Joanna Glasner, *Fox is At Home in Broadband*, Wired News (Apr. 30, 1999), <http://www.wired.com/news/news/business/story/19416.html>; @Home Press Release, *Bloomberg and @Home Network Team to Deliver Professional Financial Content to Consumers Via Broadband Technology* (Jan. 15, 1998); @Home Press Release, *@Home Network and NBA Announce the*

under the program-access rules just as fast as it can digitally reformat all its existing programming interests and move their distribution off satellites and on to the Internet backbone.

The Commission cannot rely on the existence of its program-access complaint procedure to protect alternative distributors from the anticompetitive effects of such exclusive arrangements. The Commission must deny the application.

II. THE MERGER WOULD ELIMINATE NEEDED, REALISTIC FUTURE COMPETITION BETWEEN APPLICANTS AND THEIR AFFILIATES

The proposed merger would eliminate otherwise likely competition between the merging parties, a classic horizontal issue. The merger would combine cable systems (AT&T and MediaOne) that are realistic potential competitors for laying competing cable wires and using competing headend equipment, with adverse effects in several markets where such competition is sorely needed. It would also combine the interests of @Home and Road Runner, which are realistic potential competitors for providing broadband "content" over such wires. The applicants have not met their burden of showing that the elimination of such potential competition is in the public interest.

A. The Merger Would Eliminate Actual and Realistic Potential Competition

In addition to violating the Commission's rules, the proposed merger between AT&T and MediaOne threatens to combine significant future competitors in several distinct markets. First, @Home and Road Runner, the current market leaders, are obvious and conceded actual

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NBA Highlights Video-on-Demand Service (June 4, 1998). For its part, Road Runner has similar deals with more than 46 Web publishers to provide users exclusive broadband enhancements to standard Web content. Road Runner is hoping for more broadband-specific content in the future. *See* Bruce Haring, *Cable Connects With Serious Surfers: Speedy Hook-Ups Sell On-Line Services, But Does Their Content Make the Grade?*, USA Today, Nov. 25, 1998, at 4D.

competitors for broadband services.[61] That competition would predictably expand to more end users if and when the content-transport tying arrangements are eliminated.

In addition, there is every reason to believe that, in the absence of this merger, AT&T and MediaOne themselves would soon be substantial competitors in one another's regions — whether by laying competing wires, using nearby headend equipment to provide service over independent overbuilders like electric utilities, or otherwise. Indeed, in the companies' merger application, they acknowledge that some overbuilding has already occurred and that they have franchises to operate cable systems in a number of common services areas.[62] They also note that, because they have many adjoining systems, AT&T would be able to use the upgraded portions of MediaOne's systems in AT&T's own systems, and vice versa: "In several regions of the country . . . MediaOne cable systems that have been upgraded to provide cable telephony adjoin TCI systems that are in the process of being upgraded. This means that AT&T can connect the distribution hubs in the TCI system to MediaOne's existing, upgraded head end offices."[63] AT&T notes that this means it "will not have to duplicate the headend equipment."[64] By their own admission, then, AT&T and MediaOne would be fully capable of using their own systems to compete for

[61] @Home itself has admitted as much. "We currently compete with Road Runner to establish distribution arrangements with cable system operators, but we may compete for subscribers in the future if and when our cable partners cease to be subject to our exclusivity obligations." At Home Corp., 1999 Form 10-Q, at 16 (SEC filed May 17, 1999).

[62] AT&T/MediaOne Application at 41-42.

[63] *Id.* at 27.

[64] *Id.*

subscribers in adjoining regions. The proposed merger eliminates any possibility of competition between these cable systems.

AT&T cannot meet its burden of discounting this potential for competition in the highly monopolized cable industry by pointing to the sale of the conceded overlapping systems to wholly unspecified other firms, which may have significantly less ability or desire to implement plans to overbuild. Still less can AT&T rely on the sale of such overbuild/overlap systems to a-no-longer-independent Time Warner.[65] After the proposed merger here, AT&T will hold a 25-percent stake in Time Warner. Any Justice Department decisions about "exchange transactions" made before the present proposed merger thus carry little weight now that AT&T proposes to interlink ownership of the top three cable systems.

Head-to-head competition is far more realistic now than in past years. The Commission has recently recognized that adjoining cable operators are "the mostly likely potential overbuilder[s]" in each others' franchise areas.[66] It has further noted that geographic consolidation of cable operators "can eliminate" this form of potential competition.[67]

The number of overbuilds by companies other than cable operators has increased significantly in recent years. For example, the Commission has found that "competing franchises have been awarded covering 149 communities in 21 states with the potential to pass 7.2 million homes."[68] In recent comments filed with the commission, the National Cable Television

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[65] *Id.* at 41-42 n.93.

[66] *Fifth Video Markets Report*, 13 FCC Rcd. at 24,371 [¶ 144].

[67] *Id.*

[68] *Id.* at 24,308 [¶ 43].

Association notes that "[c]able overbuilders, which were new on the scene a year ago, are targeting large, densely populated regions around the country in joint ventures with large public utilities."[69] Even aside from a nearby cable system laying its own competing wires, such a system is perfectly poised — by the applicants' own admission — to use its nearby headend and other facilities to compete with an incumbent cable system through such a company's competing wires.

Overbuilding is also made more likely by cable operators' provision of telephone services in nearby cable franchise areas, a point of particular relevance to the present merger. Thus, in New York, AT&T provides competitive telephone services in many of the franchise areas of Time Warner (a MediaOne affiliate). Time Warner Telecom provides services in the franchise areas of Cablevision (an AT&T affiliate). Cablevision provides telecommunications services in Time Warner's New York City franchises, where Cablevision has already installed fiber.[70]

More generally, AT&T and MediaOne are especially well positioned, and hence likely, to become competitors because of their extensive geographic proximity, directly and through their affiliates (such as Cablevision and Time Warner). Thus, AT&T currently operates cable systems in Kingston and Rhinebeck (in the Hudson Valley) and has an interest in the cable network

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[69] Comments of the National Cable Television Association, Inc., at 29, *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, CS Docket No. 99-230 (filed Aug. 6, 1999) ("NCTA Comments").

[70] Cablevision's CLEC subsidiary, Lightpath, operates 840 route miles of fiber that extends across Long Island and into downtown Manhattan. *See* New Paradigm Resources Group, *1999 CLEC Report*, Cablevision, at 4 of 6; Cablevision promotional material, *Long Island's Electronic Superhighway Fiber Optic Network and Hub Locations* (1993).